

Editor's Note: appeal filed, Civ. No. C2-98-755 (S.D. Ohio, July 29, 1998); dismissed, (July 13, 2000) (moot because mining had been completed and the standard the Council advocated for VER determinations, good faith/all permits standard, had been adopted by the Dept. in subsequent rulemaking)

BUCKEYE FOREST COUNCIL, INC.

IBLA 98-132

Decided June 29, 1998

Petition for review of a Decision issued by the Acting Regional Director, Appalachian Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement, finding that there were valid existing rights to engage in surface coal mining operations on land within the Wayne National Forest in southern Ohio. VER: Perry Co., Ohio.

Motion to advance proceedings granted; Decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights:
Generally

Court precedent in the U.S. District Court for the Southern District of Ohio and OSM's commitment in litigation before that court to apply the "takings" test when making valid existing rights determinations under section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(2) (1994), for lands within the jurisdiction of that court require OSM to analyze whether prohibiting surface coal mining operations by the owner of the mineral estate of lands included within the Wayne National Forest would constitute a compensable taking under the Fifth Amendment to the U.S. Constitution.

2. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights:
Generally

An OSM decision that the owner of a mineral estate within the Wayne National Forest has valid existing rights to surface mine coal under section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(2) (1994), will be affirmed when the record establishes that banning mining would diminish the economic value of the property but not advance the public purposes underlying the prohibition of mining of Federal national forest lands.

APPEARANCES: Tom FitzGerald, Esq., Frankfort, Kentucky, for Buckeye Forest Council, Inc.; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Robert J. Shostak, Esq., Athens, Ohio, for Edward and Madeline Blaire and Buckingham Coal Company, Inc.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Buckeye Forest Council, Inc. (Buckeye) has petitioned for review of the November 19, 1997, Decision issued by the Acting Regional Director, Appalachian Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement (OSM). ^{1/} In his Decision, the Acting Regional Director found that Edward and Madeline Blaire, the mineral owners, and their lessee, Buckingham Coal Company, Inc. (Buckingham), had a valid existing right (VER) pursuant to the provisions of section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272(e)(2) (1994), to mine coal by surface mining methods on 25.2 acres of Federal land within the Wayne National Forest. ^{2/} Buckeye has also asked the Board to stay OSM's Decision and advance the proceedings. We grant Buckeye's motion to advance the proceedings, affirm OSM's Decision, and deem it unnecessary to act upon Buckeye's stay request as our decision has rendered it moot.

On April 24, 1967, the U.S. Forest Service (Forest Service) purchased an undivided one-half interest in the surface estate of a 134-acre parcel which included the 25.2 acres at issue from Daniel C. Jenkins, Jr., and others. The Forest Service obtained the remaining undivided one-half interest in the surface estate from Irene Blaire, the Blaires' predecessor, on May 1, 1967. Both deeds reserved oil, gas, coal, and clay for a period of 45 years from February 26, 1963, subject to the July 3, 1947, rules and regulations of the Secretary of Agriculture, copies of which were attached to and incorporated in the deeds of conveyance. The Blaires obtained an additional one-third of the retained mineral interest from Jenkins' widow on April 26, 1984. The Blaires then leased the right to mine coal to Buckingham.

On March 8, 1995, Buckingham submitted an application to the Ohio Department of Natural Resources, Division of Reclamation, seeking a permit to conduct surface mining and reclamation operations on 35.9 acres (25.2 acres of Federal land in the Wayne National Forest and 10.7 acres of adjoining private land). The proposed permit area ran north - south along an ephemeral tributary of Pine Run, 1.8 miles northeast of Shawnee, Ohio.

^{1/} The Decision was published in the Federal Register on Nov. 26, 1997. 62 Fed. Reg. 63187 (Nov. 26, 1997).

^{2/} The land is located in secs. 11 and 14, T. 14 N., R. 15 W., Ohio River Survey, Saltlick Township, Perry County, Ohio.

The land had been disturbed by prior surface and underground mining, and two unreclaimed highwalls and an impoundment remained on 5.1 acres at the southern end of the property. Buckingham contemplated mining a line of barrier pillars left beneath the Pine Run tributary, containing an estimated 88,200 tons of extractable coal reserves.

On August 14, 1995, Buckingham formally requested an OSM determination that it had a VER to remove the No. 6 seam coal from the 25.2 acres of Federal land within the Wayne National Forest. On August 28, 1995, OSM notified the Forest Service of the request and asked for information concerning Buckingham's right to surface mine the coal. By letter dated April 24, 1996, the Forest Service advised OSM that it was the Forest Service's opinion that Buckingham had the right to surface mine the lands described in Buckingham's application.

When formulating its conclusion, the Forest Service relied on a memorandum prepared by the Office of General Counsel, U.S. Department of Agriculture. The General Counsel concluded that, based on the references to "stripping" in the July 3, 1947, rules and regulations of the Secretary of Agriculture and Federal court precedent construing mineral reservations incorporating those rules (see, e.g., Belville Mining Co. v. United States, 999 F.2d 989, 995-96 (6th Cir. 1993)), it would be difficult to prove that the mineral reservation in the 1967 deeds did not reserve the right to surface mine the coal. The Office of General Counsel recommended that the Forest Service not contest or oppose Buckingham's application.

On March 1, 1996, OSM published a notice in the Federal Register, providing the opportunity for public comment on Buckingham's request. 61 Fed. Reg. 8074 (Mar. 1, 1996). As a result of expressions of interest in having a public hearing, OSM reopened and extended the comment period through August 16, 1996, and held a public hearing on August 8, 1996. Buckeye submitted comments and testimony opposing a finding that Buckingham had a VER to surface mine within the national forest.

Responding to a September 16, 1996, OSM request for additional information, Buckingham submitted supplemental data on September 17 and October 3, 1996. The October 3, 1996, filing added the Blaires as parties requesting the VER determination. On August 7, 1997, after OSM agreed to treat the information as presumptively confidential, Buckingham and the Blaires presented information addressing the economic viability of the proposed operation and other potential uses for the property.

In his Decision, the Acting Regional Director first outlined VER requirements for national forest lands, noting that section 522(e)(2) of SMCRA, 30 U.S.C. § 1272(e)(2) (1994), prohibited surface coal mining on Federal lands in a national forest, unless VERs to conduct surface mining operations were in existence on August 3, 1977, or the Secretary found that the lands contained no significant recreational, timber, economic, or other values incompatible with surface coal mining and the surface mining operations and impacts would be incident to an underground mine. He

stated that, until promulgation of final Federal regulations defining VERs, the suspension notice concerning VERs published in the Federal Register, 51 Fed. Reg. 41954 (Nov. 20, 1986), directed OSM to apply the VER definition found in the approved State program. He explained, however, that in Belville Mining Co. v. Lujan (Belville), No. C-1-89-790 (S.D. Ohio July 22, 1991), modified, Sept. 21, 1992, the court prohibited the use of the approved Ohio State program definition or the policy stated in the suspension notice. ^{3/} He added that, in the Belville litigation, OSM made a commitment to the court to apply the takings standard to VER determinations to Federal lands within the court's jurisdiction, including the Wayne National Forest, until it had promulgated a new Federal rule defining VERs. ^{4/} The Acting Regional Director concluded that, in the Southern District of Ohio, VERs existed if, as of the date the lands became subject to section 522(e)(2) of SMCRA, 30 U.S.C. § 1272(e)(2) (1994), applying the prohibitions of that section would constitute a compensable taking under the Fifth Amendment to the U.S. Constitution.

The Acting Regional Director stated that, in accordance with case law and the June 30, 1988, Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (Takings Guidelines), see 56 Fed. Reg. 33165-68 (July 18, 1991), OSM utilized a three-part takings analysis, examining the economic impact of the proposed Government policy or action, the extent the action or regulation interfered with reasonable investment-backed expectations of the property interest owner, and the character of the Government action. He explained that under the takings standard the Blaires would have a VER only if, as of August 3, 1977, prohibiting surface coal mining would preclude all economic use of the property or, alternatively, if disallowing surface coal mining would not substantially advance a legitimate public purpose of SMCRA, with the latter inquiry further addressing whether the prohibition would either significantly diminish the property's value or substantially interfere with the Blaires' investment backed expectations. He added that, if the Blaires had a VER to surface mine the 25.2 acres, the coal lease would have conveyed that VER to Buckingham.

The Acting Regional Director found that the Blaires' mineral estate was a recognized property interest protected by the Fifth Amendment. Buckingham's VER request addressed only 25.2 acres. However, the Acting Regional Director considered the 134-acre tract to be the relevant unit of property to be used as the basis for the economic impact of the surface mining prohibition. The Acting Regional Director accepted the value the Blaires attributed to their interest in the coal (\$88,200), based on OSM's

^{3/} The approved Ohio program utilizes the "all permits" standard, under which a person must have obtained all necessary permits prior to Aug. 3, 1977, to have VERs (SMCRA's enactment date). Ohio Rev. Code Ann. § 1501:13-3-02(A)(1)(a) (Baldwin 1997).

^{4/} The same court applied the takings standard test in a VER determination in Sunday Creek Coal Co. v. Hodel (Sunday Creek Coal), No. C-2-88-0416 (S.D. Ohio June 2, 1988).

confirmation of the 88,200 ton recoverable coal reserve estimate for the 25.2 acres leased to Buckingham. ^{5/} He found that this coal could not be mined by alternative methods, specifically underground or auger mining. He noted, however, that the Blaires' predecessors had previously exploited the bulk of the coal interest in the entire 134-acre tract through underground and surface mining, and that the prohibition therefore would only deprive the Blaires of the use of the unmined pillars of coal. As to other potential uses of the property, the Acting Regional Director ascertained that, although neither the other coal seams nor the clay deposit on the property had economic value, current oil and gas production could be increased through the development of two or three additional wells with a total value potentially equalling the estimated coal royalties from the property. Thus, the Acting Regional Director concluded that application of the surface mining prohibition would not deny the Blaires all economic use of the mineral estate of the 134-acre parcel but would, nevertheless, cause a diminution in the value of the property by precluding the recovery of the remaining coal.

Turning to the element of interference with reasonable, investment-backed expectations, the Acting Regional Director noted that the Blaires had obtained their interest in the property through inheritance, not purchase. He therefore determined that their stated expectations of exploiting the mineral interest did not qualify as investment-backed expectations. ^{6/}

Evaluating the character of the Government action, the Acting Regional Director separately addressed three components of that element identified in the Takings Guidelines: the intended purpose of the enabling statute; the action's ability to substantially advance a legitimate public purpose; and the regulated activity's contribution to the harm addressed by the Governmental action. He stated that the purpose of the surface mining prohibition was to protect Federal lands within national forests, areas Congress considered generally incompatible with surface mining operations, from the harmful effects of those operations. He then analyzed the degree surface mining the 25.2-acre parcel would create the harm addressed by Congress, focusing on the intended uses, purposes, and values of this specific national forest land. The Acting Regional Director indicated that the Wayne National Forest Plan identified the parcel as being in Management Area 3.3. The designated management goals for this area included providing high quality hardwoods on a sustained yield basis, wildlife

^{5/} The Acting Regional Director briefly discussed Buckingham's interest in the coal, noting that the economic impacts of prohibition on Buckingham were not relevant to OSM's VER determination, which focused on the property interests existing on Aug. 3, 1977.

^{6/} The Blaires assert that their purchase of an additional interest in the mineral estate in 1984 (long after Aug. 3, 1977) clearly demonstrates their investment-backed expectations in 1984.

diversity favoring species that require mature and overmature hardwoods, and dispersed recreational activities such as hiking, horseback riding, and hunting. He further noted the plan's intent that forest areas managed for those purposes would be in blocks of 1,000 acres or larger in size, and the plan's provision for mineral exploration and extraction.

After reviewing the information submitted by Buckingham and the Blaires, the Acting Regional Director concluded that mining the tract would have no significant impact on the current uses, purposes, and values of the national forest. He based this conclusion on OSM's examination of the property and finding that the small size and isolated location of the property rendered it of limited current use and value for the purposes specified in the Forest Service plan. He noted that the parcel, which was located approximately 3/4 of a mile from any other national forest tract and separated from those tracts by several diversely owned private parcels, had not been developed by the Forest Service; it was not likely that there would be any consolidation in the near future; the Forest Service characterized the timber on the parcel as low to medium quality unsuitable for the purposes delineated in the land use plan; and the parcel exhibited scars from previous mining (highwalls and subsidence depressions) and would benefit from reclamation under the proposed mining plan. He found that the Forest Service had not asserted that any Governmental interest in the national forest would be significantly impacted by the proposed mining, but rather had confirmed that the operation would likely have no significant effect on the current uses, purposes, and values of the land. He also noted that Forest Service input to the state regulatory authority would help assure that postmining reclamation returned the land to its intended uses under the forest management plan.

The Acting Regional Director summarized his conclusions as follows:

OSM deems the Blaires' interest to be key to this VER determination. * * *

As of August 3, 1977, if OSM applied the section 522(e)(2) prohibition to the Blaires' property, the Blaires would be deprived of the right to conduct surface coal mining on [the] federal lands portion of the proposed permit area, which would mean that they could not recover approximately 88,200 tons of coal. This deprivation is slight, because the majority of the coal on the entire 134-acre parcel has already been exploited by predecessors of the Blaires. In addition, the Blaires also have a remaining use of their mineral estate in the form of oil and gas production. The value of the remaining oil and gas interest is probably about equivalent to the value of the coal interest. Thus, OSM finds that (1) most of the economic value of the Blaires' coal interest has already been made by previous exploitation; (2) the Blaires retain substantial remaining use of their mineral property in the form of oil and gas production;

(3) prohibition of the proposed surface coal mining would cause a diminution in value of the Blaires' property; and (4) the Blaires have no reasonable, investment-backed expectations of surface mining this land.

Finally, the agency finds that mining of this national forest tract would not contribute significantly to the harm Congress addressed through the prohibition of mining on federal lands within national forests. Because of its small size, isolated location relative to other national forest lands, and previously mined condition, the tract is of limited current use for the designated national forest purposes. The proposed surface coal mining operation would have only minimal short-term impacts on the current use and value of the land. There are no anticipated adverse long-term impacts. Thus, mining the tract would have no significant impact on the forest and reclamation will restore the land to the planned uses under the management plan. Therefore, OSM concludes that the record does not demonstrate that prohibition of surface coal mining of the property in question would substantially advance the section 522(e) prohibition.

OSM also finds that, because most of the coal on this property has already been mined, the use of that part of the Blaires' property interest has already occurred. Therefore, a prohibition on surface mining the remaining coal would not totally abrogate a property interest historically viewed as an essential stick in the bundle of property rights. However, because prohibition would diminish the value of the Blaires' property and would not substantially advance a legitimate public purpose of SMCRA, OSM finds that application of the statutory prohibition on surface mining the Blaires' property would constitute a compensable taking of the Blaires' property interests under the Fifth Amendment to the U.S. Constitution. Therefore, OSM finds that the Blaires have VER for the lands in question and that Buckingham acquired VER for the same lands by virtue of its lease of the Blaires' coal rights.

62 Fed. Reg. 63191-92 (Nov. 26, 1997).

Buckeye petitioned for review of OSM's VER determination. Buckingham and the Blaires answered jointly, and OSM filed a separate answer. On February 9, 1998, after OSM's Decision had become final in accordance with 43 C.F.R. §§ 4.1393 and 4.21(a), Buckeye filed its request for stay pending appeal and motion to advance the proceedings. Buckingham and the Blaires and OSM submitted responses. All of the pleadings comprehensively address the merits of OSM's VER determination.

Buckeye attacks OSM's VER finding on two fronts, contending that OSM erroneously applied the takings standard when analyzing whether the Blaires had a VER to surface mine the coal and, that, in any event, OSM misapplied

that standard. Specifically, Buckeye argues that OSM's utilization of the takings standard violated the mandate of the U.S. District Court for the District of Columbia in In Re: Permanent Surface Mining Regulation Litigation, 22 E.R.C. 1557 (D.D.C. 1985), invalidating OSM regulations that defined VERs through use of the takings test because OSM had failed to adhere to the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1994). Buckeye asserts that application of the takings test also contravenes OSM policy announced in the Federal Register notice of the suspension of the takings standard, 51 Fed. Reg. 4154-55 (Nov. 20, 1986), which states that OSM will apply the VER definition found in the appropriate state or Federal regulatory program to Federal lands. Buckeye objects to OSM's reliance on a commitment to the court in the Belville case as justification for using the takings standard rather than the all permits test found in the approved Ohio program. Buckeye asserts that OSM's failure to promulgate its commitment to the court as a rule, pursuant to 5 U.S.C. § 553 (1994), renders use of the takings standard invalid. Buckeye also disputes the relevance of the commitment to this case, given the lack of any judicial decision binding OSM to apply the takings test for all VER determinations in the Wayne Forest and the lack of any privity between the parties in Belville and those in this case. It claims that application of the commitment is an ultra vires act which undercuts the exclusive jurisdiction of the District of Columbia Circuit to hear and determine actions involving any national rule found in 30 U.S.C. § 1276 (1994).

Buckeye insists that, even if the takings standard were the appropriate analytical test, OSM misapplied the test to the question of whether the Blaires had a VER. Buckeye avers that, as a matter of law, mere diminution in value, absent other factors, does not constitute a taking, and that this is especially true, given OSM's finding that the Blaires had no investment-backed expectations in the property. Buckeye further asserts that OSM erred in resting the VER determination on the conclusion that protecting the specific 25.2-acre parcel of national forest would not substantially advance a legitimate state interest. Buckeye maintains that Congress made a categorical finding that national forest lands are entitled to protection, and that OSM improperly converted this Congressional finding into a site specific analysis of whether the particular 25.2-acre parcel deserves protection. According to Buckeye, OSM lacks the authority to question a Congressional finding that the statutory prohibition advances a legitimate state purpose, and, therefore, the agency improperly found that protecting this tract would not further the protection of forest lands. Buckeye concludes that OSM's VER determination lacks foundation and must be reversed.

In response, OSM argues that it properly applied the takings standard, given the specific circumstances of this VER determination. It explains that the Belville litigation involved coal in the Wayne National Forest. It notes that the district court enjoined it from utilizing the VER standard announced by the Secretary in his 1986 suspension notice. The agency asserts that, after the ruling, it advised the court that, to protect the interests of Ohio VER applicants pending the promulgation of a new national

VER definition, OSM would make VER determinations on a case by case basis, utilizing the takings approach which was followed by the court in Sunday Creek Coal. OSM contends that, notwithstanding its commitment to the Belville court, the court in the Southern District of Ohio has held that application of the all permits test when determining VERs results in an unconstitutional taking. The OSM expresses its opinion that this case law is ample justification for OSM's use of the takings test in this case.

The agency further argues that it properly applied takings law when it performed a fact-based analysis of the Government's and mineral owner's interests to determine the nature of the public interest and the diminution in value. It avers that a takings inquiry should focus on a specific tract, and requires a fact-based analysis of the Government's interests in that property. The agency argues that by weighing the goal of protecting sensitive areas, which animates SMCRA's general surface coal mining prohibition, against how a prohibition of mining of a specific tract advances those purposes, the agency fully comports with the requirements of takings jurisprudence, especially given the fact that national forests serve multiple purposes and require a variety of protections. The agency asserts that the values being protected, the gravity of the public's interest, and the economic impact must be examined in a manner applicable to the tract in question.

In reaching its VER determination, OSM submits that it essentially compared the diminution in value of the property occasioned by application of the prohibition of mining with the gravity of the public interest involved. Based upon its conclusion that no substantial public interest would be advanced by precluding mining of the subject property, OSM maintains that the diminution in value necessary to constitute a taking should be slight. Although Buckeye would expand both the definition of and weight accorded to the public interest, OSM contends that it properly concluded that diminishing the economic interest of the mineral owners by precluding them from exercising their remaining mining rights would be found to be compensable in this case, and that its VER determination must, therefore, be affirmed.

In their response, the Blaires and Buckingham argue that the takings test was the only test available when OSM made the VER determination, citing the Sunday Creek Coal and Belville decisions and OSM's written commitment in the Belville litigation to make interim VER determinations, pending publication of a final VER rule, on a case-by-case basis using the takings approach. They note that Buckeye knew as early as March 1, 1996, when notice of the VER determination application was published, that OSM would use the takings standard, but took no action to prevent use of that standard, despite the availability of citizen's suits under SMCRA. They further assert that OSM properly conducted the takings analysis by first determining that the Blaires had a property right cognizable under the Fifth Amendment and then concluding that imposition of the surface mining prohibition would constitute a compensable taking.

[1] Section 522(e) of SMCRA, 30 U.S.C. § 1272(e) (1994), provides that, "[a]fter August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted * * * (2) on any Federal lands within the boundaries of any national forest." ^{7/} This statute does not define VERs and OSM has spent years attempting to develop an appropriate interpretation. See The Steams Co., 110 IBLA 345, 348-49 (1989).

The initial definition of VERs promulgated by the Department required the concurrent existence of two factors on August 3, 1977: property rights created by a legally binding instrument which authorized production of coal by surface mining operations and issuance of all "State and Federal permits necessary to conduct such operations on those lands" (referred to as the "all permits" test). 30 C.F.R. § 761.5, 44 Fed. Reg. 15342 (Mar. 13, 1979). Upon judicial review, the district court remanded the regulation for revision to the extent it failed to recognize that an operator who made a good faith attempt to obtain all permits before August 3, 1977, could have VERs. In Re: Permanent Surface Mining Regulation Litigation, 14 E.R.C. 1083, 1091 (D.D.C. 1980). On remand OSM published a notice suspending this definition of VERs, stating that "[p]ending further rulemaking, the Secretary will interpret this regulation as requiring a good faith effort to obtain all permits." 45 Fed. Reg. 51548 (Aug. 4, 1980).

The Department promulgated a new definition of VERs, effective October 14, 1983. This definition adopted the takings test. 30 C.F.R. § 761.5, 48 Fed. Reg. 41348-49 (Sept. 14, 1983). Upon judicial review, the district court remanded the takings test regulation to the Department, stating that the regulation was so different from the terms of the proposed regulations published in the Federal Register that the Department had failed to provide an adequate opportunity for public notice and comment under section 4 of the APA, 5 U.S.C. § 553 (1994). In Re: Permanent Surface Mining Regulation Litigation, 22 E.R.C. 1557 (D.D.C. 1985).

In response to the court ruling, the Department suspended the takings test definition of VERs, reinstated the 1980 good faith/all permits test, and adopted the definitions of VERs found in approved state programs for Federal lands, including national forest lands. 51 Fed. Reg. 41954-55 (Nov. 20, 1986). However, as noted above, when the Belville court enjoined OSM from using Ohio's all permits VERs test for lands in the Wayne National Forest, OSM notified that court that, pending promulgation of a final VERs rule, it intended to make interim VER determinations on a case-by-case

^{7/} Section 522(e)(2)(A) of SMCRA, 30 U.S.C. § 1272(e)(2)(A) (1994), allows surface coal mining on Federal lands in national forests "if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and * * * surface operations and impacts are incident to any underground coal mine."

basis, using the takings test. See the Blaire and Buckingham Response to Stay Request, Ex. H at A-4. Since August 1, 1991, OSM has interpreted the court's decision as barring the use of the 1986 suspension notice in the State of Ohio. See 62 Fed. Reg. 4836, 4843 (Jan. 31, 1997).

Buckeye objects to OSM's application of a takings test definition to VER determinations because that test has not been properly promulgated as a regulation and contravenes agency policy stated in the 1986 suspension notice. ^{8/} The fact that use of the takings standard in this case does not emanate from rulemaking pursuant to the APA, 5 U.S.C. § 553 (1994), does not invalidate use of that standard. Its application stemmed from adjudication which is not subject to APA notice and comment provisions. See Oryx Energy Co., 137 IBLA 177, 185 (1996). If OSM were to continue use of the all permits test, as Buckeye demands, despite the court's specific rejection of that test, it would be placed in the untenable position of having to choose between applying an invalid test in violation of a court order or abdicating its duty to adjudicate VER requests in a timely manner. We find that, under the particular circumstances of this case, OSM did not err when it applied the takings standard to determine whether the Blaires had a VER to surface mine the coal on the specified 25.2 acres of Federal land within the Wayne National Forest.

[2] When it conducted its takings analysis, OSM followed the principles established by the U.S. Supreme Court. Rather than developing a set formula for determining when justice and fairness require that economic costs or losses caused by Government action should be compensated by the Government, the Court has relied on an ad hoc factual analysis to determine whether the action constitutes a taking compensable under the Fifth Amendment. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). We note, however, that the Supreme Court has repeatedly identified three factors it considers significant to the determination: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (3) the character of the Governmental action. Connolly v. Pension Benefit Guarantee Corp., 475 U.S. 211, 224-25 (1986); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). After analyzing these

^{8/} Buckeye correctly states that the regulation defining VERs under the takings test was invalidated by the district court. However, that court rejected the definition on procedural not substantive grounds. We are unaware of any holding that a takings definition of VERs is inconsistent with SMCRA. In fact, in National Wildlife Federation v. Hodel, 839 F.2d 694, 750 (D.C. Cir. 1988), the court stated that the legislative history of SMCRA suggested that Congress did not intend to effect takings through section 522(e). That court also cited a footnote in the U.S. Supreme Court's decision in Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 296 n.37 (1981), indicating that limiting VERs to mining operations for which all permits had been issued was not compelled by either the statute or the legislative history. 839 F.2d at 750 n.86.

three factors, OSM concluded that the Blaires had a VER to conduct surface coal mining operations on the 25.2-acre parcel in the Wayne National Forest because prohibiting such mining would diminish the value of the Blaire's property rights without substantially advancing a legitimate statutory purpose of SMCRA. We agree.

Buckeye does not contend that prohibiting surface coal mining will not diminish the value of the Blaires' property rights. Nor does it contend that OSM's characterization of the affected land as a small, isolated, previously disturbed tract with minimal utility for recreational or timber uses was incorrect. Rather, Buckeye asserts that neither the diminution in value nor the specific parcel's contribution to the values animating SMCRA's prohibition on surface mining in national forests suffices to establish that application of the ban constitutes a compensable taking.

Diminution in value, standing alone, does not result in a taking. Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 645 (1993). However, diminution in value is a relevant factor to be weighed against the intended public benefit of the mining prohibition when addressing the taking question. See Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388, 394 (1988), aff'd, 28 F.3d 1171 (Fed. Cir 1994). Similarly, the failure to advance a legitimate state interest, without more, does not dictate a finding that a taking has occurred, but that element of the taking analysis must be considered as well. Id. at 390. The OSM did not rely solely on either element, but properly considered each in conjunction with the other.

Buckeye insists that OSM's inquiry into whether the mining prohibition advances a legitimate state interest begins and ends with the finding that protection of public lands falls within the scope of Congress' legislative authority. According to Buckeye, Congress' categorical determination that national forest lands are entitled to protection for the recreation and enjoyment of the American people reflected in the language in section 522(e)(2) and in the legislative history proscribes OSM from evaluating whether applying the prohibition to a specific forest tract would advance those goals. However, Buckeye's position conflicts with case law holding that the factual circumstances of each case is the proper focus when making a takings analysis. See Penn Central Transportation Co. v. New York City, 438 U.S. at 124. Buckeye's view also ignores the Takings Guidelines' requirement that the adjudicator examine "[t]he degree to which the property-related activity or use that is the subject of the proposed policy or action contributes to a harm that the proposed policy or action is designed to address," and its caution that "[t]he less direct, immediate, and demonstrable the contribution of the property-related activity to the harm to be addressed, the greater the risk that a taking will have occurred." 56 Fed. Reg. 33166 (July 18, 1991).

In any event, the surface coal mining prohibition in section 522(e)(2) is not absolute. Not only does SMCRA explicitly recognize VERs, but the ban on surface coal mining in national forests also contains the proviso that such mining may be permitted if "the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and * * * surface operations and impacts are incident to an underground coal mine." 30 U.S.C. § 1272(e)(2)(A) (1994). Although not directly applicable here, this proviso nevertheless evidences Congressional recognition that, even absent VERs, surface coal mining on certain portions of national forest lands would not impede the mining ban's purpose of protecting forest lands for recreational and other uses. Thus OSM properly evaluated whether

prohibiting surface coal mining on the parcel at issue would substantially advance the purposes motivating the mining ban.

The record amply supports OSM's conclusion that SMCRA's goals of protecting recreational and other values in national forests would not be furthered by disallowing mining on this 25.2-acre parcel. The parcel is small and isolated from other forest lands, and contains scars from earlier underground and surface mining that would be reclaimed during the course of the proposed mining. The Forest Service has not developed the land for recreation and has expressly concluded that, in its current condition, the tract is of minimal value for both recreation and timber purposes. In fact, the anticipated reclamation should improve the condition of the parcel, rendering it more suitable for the uses envisioned in the Wayne National Forest Plan. Prohibiting mining on the parcel would not advance a legitimate purpose of SMCRA and would diminish the value of the Blaires' property rights. We find no error in OSM's conclusion that the Blaires have a VER to conduct surface coal mining on the land, and that they had assigned that right to Buckingham.

To the extent not specifically addressed herein, Buckeye's additional arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Buckeye's motion to advance the proceedings is granted, and the Acting Regional Director's Decision is affirmed.

R.W. Mullen
Administrative Judge

I concur:

James L. Bymes
Chief Administrative Judge

